Gurcharan Singh a/l Karnal Singh v Mninder Kaur a/p Piara Singh

HIGH COURT (KUALA LUMPUR) — DECLARATION PETITION NO S8–33–108 OF 2009
SURAYA OTHMAN J
1 JUNE 2010

Family Law — Divorce — Foreign decree — Recognition of — Whether foreign decree of divorce valid under Malaysian law — Whether foreign decree of divorce was granted by court of parties' domicile — Whether petitioner acquired domicile of choice in USA — Whether declaring foreign decree as valid caused substantial injustice to respondent wife and children — Law Reform (Marriage and Divorce) Act 1976 ss 3(2), 48, 49, 76, 77 & 107

The marriage of the petitioner husband and the respondent wife had been registered under the Law Reform (Marriage and Divorce) Act 1976 ('the LRA 1976') on 1 October 1988 at the Registry of Civil Marriages in Seremban, Negeri Sembilan, Malaysia. There were two children from the marriage. The petitioner claimed that when the respondent and the children had deserted him on 5 December 2007, he had moved to the United States of America ('USA') in 2008 for emotional and mental support from family members residing in the USA. The plaintiff stated in his affidavit that he had left Malaysia to settle down in the USA and that therefore he had acquired a domicile of choice in the USA. On 28 March 2008, the respondent filed an originating summons for guardianship, custody, care and control of the children and for maintenance for herself and the children. Under this suit, which is still pending, the respondent had been granted an ad interim injunction restraining the petitioner from disposing of the matrimonial properties. On 15 May 2008, the petitioner had filed a suit in Phoenix, Arizona, USA for the dissolution of the marriage, on the basis that he is a permanent resident of the USA having resided in the State of Arizona for at least 90 days prior to the filing of the said petition. On 3 November 2008, the Superior Court of Arizona granted the petitioner a decree of dissolution of the said marriage. Subsequently the petitioner filed the instant application for a declaration under s 107 of the LRA 1976 that the decree of dissolution of marriage granted by the Superior Court of Arizona was valid. It was the petitioner's case that he had acquired a domicile of choice in the USA and that the decree of divorce granted by the Superior Court of Arizona should thus be recognised by the Malaysian courts under the common law. The petitioner submitted that since English common law recognised foreign divorces when there was a connecting factor between the parties and the foreign country, such as domicile, the Malaysian court must do likewise. In reply, the respondent

submitted that under s 48(1) of the LRA 1976, only the Malaysian court had the jurisdiction and the power to dissolve this Malaysian marriage between the petitioner and the respondent. The respondent further submitted that under s 3(2) of the LRA 1976, there existed a presumption that the petitioner being a Malaysian citizen was deemed to be domiciled in Malaysia and that the petitioner had failed to provide evidence to rebut that presumption. The sole issue to be determined in this case was whether the decree of dissolution of the marriage granted by the Superior Court of Arizona was valid under the Malaysian law.

Held, dismissing the petition with costs:

(1) As the marriage was solemnised in Malaysia, the foreign decree obtained by the petitioner in this case required a court order declaring it to be valid. Malaysia does not have any specific provision in the LRA 1976 or any other legislation for the recognition of a foreign divorce, so the Malaysian court would need to refer to the UK common law position pursuant to s 3 of the Civil Law Act 1956 and also s 47 of the LRA 1976. According to English case law, the true test of jurisdiction to dissolve a marriage was the domicile of the married pair. Thus a divorce granted by a court of another country would not be recognised as valid in England unless the parties were domiciled in that country. Similarly, by applying the relevant common law principle, a Malaysian court should only recognise a foreign decree of divorce to dissolve a Malaysian marriage if it was granted by the court of the parties' domicile (see paras 27–31 & 33).

(2) Under s 3(2) of the LRA 1976, the petitioner, who at all material times had been and continues to be a citizen of Malaysia, is deemed to be domiciled in Malaysia and the burden is on him to rebut this presumption of law. When a domicile of choice is obtained, the domicile of origin would be held in abeyance until the abandonment of the domicile of choice. In the present case, although the petitioner had sworn an affidavit that he had acquired a domicile of choice in the USA, the oath of a person whose domicile is in question as to his intention to change his domicile is not conclusive. There was no clear evidence to support the fact that the petitioner had abandoned his Malaysian domicile. In his affidavit, the petitioner had not confirmed or affirmed that he had given up his Malaysian citizenship or stated that he intended to reside permanently in the USA (see paras 34–35, 37 & 40–41).

(3) Further, the petitioner filed a petition for divorce after having resided in the State of Arizona for only 90 days. This was too short a stay to show the petitioner's intention to make the USA his permanent residence (see para 42).

(4) A Malaysian court applying the common law position would only recognise a foreign decree of divorce, which purports to dissolve a Malaysian marriage, if it was granted by the court of the parties' domicile or if it was granted by a foreign court which assumed jurisdiction on the same grounds as the Malaysian court would have assumed jurisdiction. In the present case, since the parties are both domiciled in Malaysia, the court had the jurisdiction and the power to dissolve the marriage under ss 48 and 49 of the LRA 1976 (see paras 46–47).

(5) If the foreign decree was declared as valid, the Malaysian court would not be able to adjudicate upon any ancillary reliefs filed by the respondent in view of ss 76 and 77 of the LRA 1976. This would mean that the Malaysian court would not have the jurisdiction to order the division of property acquired in Malaysia during the subsistence of the marriage between the parties, and thus have caused substantial injustice to the wife and children who are Malaysian citizens and continued to reside in Malaysia (see para 51).

[Bahasa Malaysia summary

Perkahwinan pempetisyen dan responden didaftarkan di bawah Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta 1976') pada 1 Oktober 1988 di Jabatan Pendaftaran Perkahwinan di Seremban, Negeri Sembilan, Malaysia. Terdapat dua orang anak hasil perkahwinan tersebut. Pempetisyen mendakwa bahawa apabila responden dan anak-anak meninggalkannya pada 5 Disember 2007, dia telah berhijrah ke USA pada 2008 untuk mendapat sokongan emosi dan mental daripada keluarganya yang tinggal di USA. Pempetisyen menyatakan dalam afidavitnya bahawa dia meninggalkan Malaysia untuk menetap di USA dan oleh itu dia telah memperoleh domisil pilihan di USA. Pada 28 Mac 2008, responden memfailkan saman pemula untuk penjagaan, hak jagaan, peliharaan dan kawalan ke atas anak-anaknya dan nafkah untuk dirinya dan juga anak-anak. Di bawah guaman ini, yang mana masih belum selesai, responden telah diberikan injunksi ad-interim menghalang pempetisyen daripada menjual harta sepencarian. Pada 15 Mei 2008, pempetisyen telah memfailkan suatu guaman di Phoenix, Arizona, USA untuk pembubaran perkahwinan, atas dasar bahawa dia merupakan penduduk tetap USA kerana telah menetap di Arizona selama kira-kira 90 hari sebelum memfailkan petisyen tersebut. Pada 3 November 2008, Superior Court Arizona memberikan pempetisyen suatu dekri pembubaran perkahwinan tersebut. Kemudiannya pempetisyen memfailkan permohonan ini bagi suatu perisytiharan di bawah s 107 Akta 1976 bahawa dekri pembubaran perkahwinan yang diberikan oleh Superior Court Arizona adalah sah. Adalah menjadi kes pempetisyen bahawa dia telah mendapat domisil pilihan di USA dan bahawa dekri perceraian yang dikeluarkan oleh Superior Court Arizona harus diiktiraf oleh

mahkamah-mahkamah Malaysia di bawah common law. Pempetisyen menghujah bahawa memandangkan common law Inggeris mengiktiraf perceraian luar negera apabila terdapat faktor hubung kait antara pihak-pihak dan juga negera asing tersebut, umpamanya domisil, mahkamah Malaysia mestilah mengiktirafnya juga. Sebagai jawapan, responden menyatakan bahawa di bawah s 48(1) Akta 1976 hanya mahkamah Malaysia mempunyai bidang kuasa dan kuasa untuk membubarkan perkahwinan di Malaysia antara pempetisyen dan responden. Responden seterusnya menyatakan bahawa di bawah s 3(2) Akta 1976 wujudnya anggapan bahawa pempetisyen seorang warganegara Malaysia hendaklah disifatkan sebagai berdomisil di Malaysia dan bahawa pempetisyen gagal memberi keterangan untuk menyangkal anggapan tersebut. Satu-satunya isu untuk dipertimbangkan dalam kes ini ialah sama ada dekri pembubaran perkahwinan yang diberikan oleh Superior Court Arizona sah di sisi undang-undang Malaysia.

Diputuskan, menolak petisyen dengan kos:

(1) Disebabkan perkahwinan tersebut diupacarakan di Malaysia, dekri luar negera tersebut yang diperoleh pempetisyen dalam kes ini memerlukan perintah mahkamah mengisytiharkannya sah. Malaysia tidak mempunyai peruntukan khusus dalam Akta 1976 atau mana-mana perundangan bagi mengiktiraf perceraian luar negera, oleh itu mahkamah Malaysia perlu merujuk kedudukan common law UK berikutan s 3 Akta Undang-Undang Sivil 1956 dan juga s 47 Akta 1976. Menurut perundangan kes Inggeris, ujian sebenar bagi bidang kuasa untuk membubarkan perkahwinan adalah domisil pasangan yang berkahwin itu. Oleh itu, perceraian yang diberikan oleh mahkamah negara lain tidak akan diiktiraf sah di England melainkan pihak-pihak berdomisil di negara tersebut. Begitu juga dengan menggunapakai prinsip common law yang relevan, mahkamah Malaysia seharusnya hanya mengiktiraf dekri perceraian luar negera untuk membubarkan perkahwinan di Malaysia jika dekri tersebut diberikan oleh mahkamah yang mana pihak-pihak tersebut berdomisil (lihat perenggan 27–31 & 33).

(2) Di bawah s 3(2) Akta 1976, pempetisyen yang pada kesemua masa material adalah dan berterusan menjadi warganegara Malaysia, dianggap berdomisil di Malaysia dan beban adalah padanya untuk menyangkal anggapan undang-undang ini. Apabila domisil pilihan diperolehi, domisil asal tidak lagi berkuat kuasa sehinggalah domisil pilihan ditinggalkan. Dalam kes ini, walaupun pempetisyen telah mengaku sumpah suatu afidavit bahawa dia telah memperoleh domisil pilihan di USA, sumpah seseorang yang domisilnya dipersoalkan atas niatnya menukar domisil adalah tidak kukuh. Tiada keterangan jelas menyokong fakta bahawa pempetisyen telah meninggalkan domisil Malaysianya. Dalam afidavitnya, pempetisyen tidak menentusahkan

atau mengesahkan bahawa dia telah meninggalkan kewarganegaraan Malaysia atau menyatakan bahawa dia berniat untuk menetap di USA secara tetap (lihat perenggan 34–35, 37 & 40–41).

(3) Selanjutnya, pempetisyen memfailkan petisyen perceraian selepas menetap di Arizona hanya selama 90 hari. Tempoh ini terlalu singkat untuk menunjukkan niat pempetisyen menjadikan USA kediaman tetapnya (lihat perenggan 42).

(4) Mahkamah Malaysia menggunapakai kedudukan common law akan hanya mengiktiraf dekri perceraian luar negera, yang bertujuan membubarkan perkahwinan di Malaysia, jika diberikan oleh mahkamah yang mana pihak-pihak berdomisil atau jika diberikan oleh mahkamah luar negera yang memperoleh bidang kuasa atas dasar yang sama dengan mahkamah Malaysia akan memperoleh bidang kuasa. Dalam kes ini, memandangkan pihak-pihak berdomisil di Malaysia, mahkamah mempunyai bidang kuasa dan kuasa untuk membubarkan perkahwinan tersebut di bawah ss 48 dan 49 Akta 1976 (lihat perenggan 46–47).

(5) Jika dekri luar negera tersebut diisytiharkan sah, mahkamah Malaysia tidak boleh menghakimi atas apa-apa relief sampingan yang difailkan oleh responden berikutan ss 76 dan 77 Akta 1976. Ini bermakna mahkamah Malaysia tidak mempunyai bidang kuasa untuk memerintahkan pembahagian harta yang diperoleh di Malaysia dalam masa perkahwinan pihak-pihak, dan oleh itu mengakibatkan ketidakadilan substansial ke atas isteri dan anak-anak yang merupakan warganegara Malaysia dan terus menetap di Malaysia (lihat perenggan 51).]

Notes

For foreign decree for divorce, see 7(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3369–3370.

Cases referred to

Armitage v The Attorney-General (Gillig Cited) Gillig v Gillig [1906] P 135 (refd)
Bater v Bater, Otherwise Lowe [1906] P 209, CA (refd)
Bhagwan Singh decd, Re [1964] MLJ 360, HC (refd)
D v D (Nature of Recognition of Oversea Divorce) (2006) 2 FLR 825 (refd)
Henderson v Henderson [1965] 1 All ER 179 (refd)
Indyka v Indyka [1969] 1 AC 33, HL (refd)
James Sloan v Sarala Devi Sloan [2010] 4 CLJ 483, HC (refd)
Joseph Wong Phui Lun v Yeoh Loon Goit [1978] 1 MLJ 236, HC (refd)
Le Mesurier v Le Mesurier and others [1895] AC 517; [1895–99] All ER Rep 836, PC (refd)

Melvin Lee Campbell v Amy Anak Edward Sumek [1988] 2 MLJ 338, HC (refd)
Siah Teong Woei v Janet Traynor [2010] 2 MLJ 820; [2010] 3 CLJ 361, HC (refd)
Sivarajan v Sivarajan [1972] 2 MLJ 231, HC (refd)
Tan Guan Hock v Khor Chai Heah [1990] 1 MLJ 422, SC (refd)
Travers v Holley [1953] 2 All ER 794; [1953] P 246, CA (refd)

Legislation referred to

Age of Majority Act 1971 s 2
Civil Law Act 1956 s 3
Law Reform (Marriage and Divorce) Act 1976 ss 3(2), 47, 48, 48(1), 49, 76, 77, 107
Matrimonial Causes Act 1899 [NSW]
Matrimonial Causes Act 1937 [UK] s 13

SY Chew (Siew Choon Jern with her) (Douglas Yee & Associates) for the petitioner.
Balwant Singh Sidhu (Balwant Singh Sidhu & Co) for the respondent.

Suraya Othman J:

INTRODUCTION

[1] This is an application under s 107 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) ('LRA 1976') by the petitioner husband by way of petition in encl (1) praying for the following orders:

(a) that this court may declare that the decree of dissolution of marriage obtained by the petitioner husband on 3 November 2008 in the Superior Court of Arizona at Phoenix in the United States of America ('USA') is valid;

(b) that the respondent wife may be condemned in the costs of this suit; and

(c) any other relief deemed suitable by the honorable court.

FACTS AND BACKGROUND

[2] The petitioner husband and respondent wife were married on 1 October 1988 at the Registry of Civil Marriages in Seremban, Negeri Sembilan Malaysia. After the marriage, the parties had cohabited in Malaysia and last cohabited at No 11, Jalan PJU 3/26, Sunway Damansara, 47810 Petaling Jaya Selangor.

[3] There are two children of the marriage; Gurpreet Singh Khera born on 17 April 1991 and Harpreet Kaur Khera born on 28 December 1992.

[4] The petitioner claims that the respondent and the children had deserted him on 5 December 2007 and as a result he suffered emotional and psychological distress. Thereafter he had to resign from his job as a consultant clinical oncologist at the Damansara Specialist Hospital on or around 28 January 2008 since he could not cope with his job due to his marital problems.

[5] The petitioner then claims that his family members including siblings, nephews and nieces in United States of America ('USA') realised his distress and offered to help him and they invited him to come to stay in the USA. He claims that he had originally planned to relocate to the USA for the children's education and he had made preparations for this plan as far back as 1988. He then claims he decided to go to the USA to join his family members as he desperately needed their emotional and mental support to survive as well as to get treatment from a psychiatrist there.

[6] The petitioner has Malaysian citizenship and says that he has been ordinarily resident in the USA since 29 January 2008. There is one proceeding in Malaysia previous to the proceeding herein between the parties. The proceeding is under Originating Summons No S8–24–30 of 2008 filed by the respondent on 28 March 2008 for guardianship, custody, care and control of the children and also for the respondent's and the children's maintenance. The court in this suit has granted an ad interim injunction on 23 April 2008 restraining the petitioner from disposing of the matrimonial properties. This suit is still pending.

[7] There is one proceeding in the USA previous to the proceeding herein between the parties, ie in the Superior Court of the State of Arizona, Petition for Dissolution of Marriage No FC2008–003478. This suit is filed by the petitioner in Phoenix in the State of Arizona, USA on 15 May 2008 for dissolution of the said marriage (exh GUR-5 of the petition).

[8] The petitioner claims that the said court in the State of Arizona took jurisdiction on the basis that the petitioner is a permanent resident of the USA having resided in the State of Arizona for at least 90 days prior to the filing of the said petition for dissolution of marriage (exhs GUR-6, GUR-7 and GUR-8 of the petition).

[9] On 3 November 2008, the Superior Court of Arizona in the State of Arizona in the USA at Phoenix granted a decree of dissolution of the said marriage solemnised in Malaysia on 10 October 1988 (exh GUR-11 of the petition).

[10] Subsequently, the petitioner filed this application before this court for a declaration under s 107 of the LRA 1976 that the decree of dissolution of

marriage obtained by him on 3 November 2008 in the Superior Court of Arizona at Phoenix in USA is valid.

SUBMISSION OF COUNSELS

[11] Ms SY Chew, counsel for the petitioner, argued that the petitioner left Malaysia to settle down in the USA and he therefore had acquired a domicile of choice in the USA. On this basis, learned counsel submitted that under English common law, recognition is given to foreign divorces when there is a connecting factor between the parties and the foreign country such as domicile. Ms SY Chew further submitted that there were changes to this general approach and the English court gave recognition to a foreign decree using the *Travers v Holley* [1953] 2 All ER 794 approach. Under this approach foreign decree is recognised as valid if it was governed by principles of validity which the English court follow, for example under the residential requirement which enable a wife to obtain a divorce in a country in which the husband was not domicile.

[12] Ms SY Chew further argued that sufficient notice of the petitioner's petition was given to the respondent; she was served the divorce papers and given an opportunity to appear at the hearing in the USA court but failed to do so. Thus there was no substantial injustice in the way the petitioner obtained his divorce decree in the USA court.

[13] Ms SY Chew also submitted that our law on domicile follows the English common law principles, that is, a woman acquires the domicile of her husband immediately upon marriage and during the subsistence of the marriage her domicile is that of her husband's. In this light, Ms SY Chew referred to the case of *Bater v Bater, Otherwise Lowe* [1906] P 209 (CA) for support.

[14] Ms SY Chew also referred to the case of *D v D (Nature of Recognition of Oversea Divorce)* (2006) 2 FLR 825 which reiterates the longstanding principle that a divorce dissolves marital status, but not the solemnisation of a marriage.

[15] In replying to the above submission, Mr Balwant Singh Sidhu, counsel for the respondent, submitted that only the Malaysian court has jurisdiction and power to dissolve this Malaysian marriage as stated under s 48(1) of the LRA 1976.

[16] Mr Balwant Singh Sidhu also argued that under s 3(2) of the LRA 1976, there exist a presumption of law that the petitioner being a Malaysian citizen is deemed to be domiciled in Malaysia. The petitioner in this case has failed to rebut that presumption since he has not proven that he has abandoned his

Malaysian domicile for that of the USA since there is no evidence of any intention on his part to remain in the USA permanently. In this regard, Mr Balwant Singh Sidhu submitted the following cases; *Re Bhagwan Singh decd* [1964] MLJ 360; *Joseph Wong Phui Lun v Yeoh Loon Goit* [1978] 1 MLJ 236; *Melvin Lee Campbell v Amy Anak Edward Sumek* [1988] 2 MLJ 338 and *Tan Guan Hock v Khor Chai Heah* [1990] 1 MLJ 422 in support of his contention.

[17] Mr Balwant Singh Sidhu further submitted that as Malaysia is not a signatory to the Hague Convention for the Recognition of Foreign Divorce, the Malaysian courts are free to exercise its discretion whether to recognise or not such purported dissolutions of Malaysian marriages.

[18] Mr Balwant Singh Sidhu further argued that a Malaysian court must apply the common law position and should only recognise a foreign decree of divorce if it was granted by the court of the parties' domicile, or, if it was granted by a foreign court which assumed jurisdiction on the same grounds as the Malaysian court would assumed jurisdiction. On this point, Mr Balwant Singh Sidhu referred to the following cases of *Le Mesurier v Le Mesurier and others* [1895] AC 517; *Armitage v The Attorney-General (Gillig Cited) Gillig v Gillig* [1906] P 135 and *Travers v Holley* [1953] P 246 to support his contention.

[19] Mr Balwant Singh Sidhu also submitted that recognition of a foreign divorce obtained by the husband would work great injustice to the respondent and it is only fair and just that all issues should be determined by the Malaysian court.

FINDINGS OF THE COURT

[20] This court has considered the written submissions and the affidavits filed by both parties in this matter.

PRIMARY ISSUE

[21] Having regard to the facts of this case and the above submissions, the primary issue to be decided here is *whether the decree of dissolution of the said marriage dated 3 November 2008 granted by the Superior Court of Arizona in the State of Arizona at Phoenix in the USA should or should not be recognised as valid for the purposes of the law of Malaysia*.

THE LAW

Jurisdiction of Malaysian courts

[22] The law applicable for this court to dissolve a marriage is found in ss 48

and 49 of the LRA 1976. Section 48(1) of the LRA 1976, authorises the court to grant a decree of divorce in such circumstances. Section 48 provides:

48 Extent of power to grant relief

(a) where the marriage of the parties has been registered or is deemed to be registered under this Act; or

(b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and

(c) where the domicile of the parties to the marriage at the time when the petition is presented in Malaysia.

[23] The marriage of the parties had been registered under the LRA 1976 on 1 October 1988 in Seremban, Negeri Sembilan, Malaysia. The certificate of marriage is annexed with the petition. The parties have at all material times been, and continue to be, citizens of Malaysia.

[24] Section 49 provides additional powers to the court to grant a decree of divorce to a wife in certain circumstances. Section 49 provides:

49 Additional jurisdiction in proceedings by a wife

(1) Notwithstanding anything to the contrary in paragraph 48(1)(c), the court shall have jurisdiction to entertain proceedings by a wife under this Part, *although the husband is not domiciled or resident in Malaysia if* —

(a) *the wife has been deserted by the husband*, or the husband has been deported from Malaysia under any law for the time being in force relating to the deportation of persons, and the husband was before the desertion or deportation domiciled in Malaysia; or

(b) *the wife is resident in Malaysia and has been ordinarily resident in Malaysia for a period of two years immediately preceding the commencement of the proceedings*.

(2) In any proceedings in which the High Court has jurisdiction by virtue of this section, the issues shall be determined in accordance with the law which would be applicable thereto if the parties were domiciled or resident in Malaysia.

(3) In this section references to deportation from Malaysia shall be construed as including banishment or expulsion under any written law.

[25] Therefore s 49 of our Act gives this court additional jurisdiction to dissolve this marriage as the respondent wife has been deserted by the petitioner husband, and she has resided here in Malaysia for more than two years — in fact throughout the marriage.

LRA 1976 (registration of foreign decree of dissolution)

[26] The law applicable for this court to declare a foreign decree as valid is found in s 107 of the LRA 1976. Section 107 provides:

> 107 Maintenance of register of divorces and annulments
>
> (1) ...
>
> (2) ...
>
> (3) *Where a marriage which is solemnized in Malaysia is dissolved* or annulled *by a decree of a court of competent jurisdiction outside Malaysia*, either of the parties may apply to the Registrar-General for the registration of such decree and *the Registrar-General, on being satisfied that the decree is one which should be recognized as valid for the purposes of the law of Malaysia, shall register that decree*.

[27] It is an established practice that registrar general will require a party to obtain a court order declaring the foreign decree as valid before the registrar general will register the foreign decree. In this premise, Malaysian courts have full discretion and power whether to recognise or not recognise the foreign decree concerned.

Section 3 of the Civil Law Act 1956 (Act 67) (common law position)

[28] As far as recognition is concerned, it must be noted that Malaysia do not have any specific section in LRA 1976 or any legislation on recognition of foreign divorce. Therefore the Malaysian Court should refer to the common law position. The law applicable on this issue is found in s 3 of the Civil Law Act 1956 which states:

> 3 Application of UK common law, rules of equity and certain statutes
>
> (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall —
>
> (a) in West Malaysia, or any part thereof, apply the *common law of England and the rules of equity as administered in England on 7 April 1956*;

[29] It is also important to note that s 47 of the LRA 1976 is relevant on this issue. Section 47 of the LRA 1976 provides:

> 47 Principles of law to be applied.
>
> Subject to the provisions contained in this Part, the court shall in all suits and proceedings hereunder act and give relief on principles in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings.

[30] In deciding whether to declare the decree of dissolution of a marriage dated 3 November 2008 as valid or invalid, this court is guided by the case of *Le Mesurier v Le Mesurier and others* [1895–99] All ER Rep 836, where Lord Watson delivering the decision of the board held that according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve a marriage. In that case the court stated:

> Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, *the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve the marriage*. They concur without reservation, in the view expressed by Lord Penzance in *Wilson v Wilson*, which were obviously meant to refer, not to question arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce (see (1872) LR 2 P & D at p 442):
>
> > It is the strong inclination of my own opinion *that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties on all cases referring their matrimonial differences to the courts of the country in which they are domicile.* Different communities have different views and laws respecting moral obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be a man and wife in one country, and stranger in another.

[31] Based on the decision aforesaid, the law on the recognition of foreign decrees of divorce by the English court is that a divorce granted by a court of another country would not be recognised as valid in England unless the parties were domiciled in that country.

[32] Here, this court would like to refer to the case of *Sivarajan v Sivarajan* [1972] 2 MLJ 231. In this case the Singapore court refused to recognise a divorce obtained from an Indian court on the basis that the court found that the parties were domiciled in Singapore at the time the divorce was granted by the Indian court. Winslow J stated that:

> It is quite clear that if the appellant had merely been a resident here who had obtained a divorce in India on the basis of his being domiciled there, the court in Singapore would recognise such a divorce. That, however, is not the position in this case. The Court of the District Munsif, Tellichery, Kerala State, did not purport to exercise jurisdiction on the ground of his being domiciled there. The court clothed itself with jurisdiction because the place where the marriage was celebrated lay within its jurisdiction. It is facts found by the magistrate that the appellant at the time he obtained his divorce in India was in fact domiciled in Singapore. The court in Singapore therefore cannot recognise such a divorce.

[33] This court is of the view that by applying the relevant common law principle, Malaysian court should only recognised a foreign decree of divorce to dissolve a Malaysian marriage if it was granted by the court of the parties' domicile.

Presumption of law

[34] In this present case, the petitioner has at all material times been and continues to be a citizen of Malaysia. Section 3(2) of the LRA 1976 is pertinent on this point. Section 3(2) states:

> 3 Application
>
> (1) ...
>
> (2) For purposes of this Act, a person who is a citizen of Malaysia shall be deemed, until the contrary is proven, to be domicile in Malaysia.

[35] By applying the aforesaid section, the petitioner is therefore deemed to be domiciled in Malaysia, and the burden is on him to rebut the above presumption of law.

Domicile

[36] Referring to the *Oxford English Dictionary*, domicile means a place of residence or ordinary habitation, a house or home, the place where one has his permanent residence, *to which, if absent, he has the intention of returning*. In the light of this case, it is pertinent for this court to discuss on domicile of choice as the petitioner has stated that his intention is to retain USA as the domicile of his choice.

[37] In Malaysia, the law on domicile is similar to common law. As regard to a domicile of choice, any person may acquire a domicile of choice provided he is an adult, that is to say, 18 years old according to s 2 of the Age of Majority Act 1971. When a domicile of choice is obtained, the domicile of origin would be held in abeyance until abandonment of the domicile of choice.

[38] In the present case, it is undisputed that the domicile of origin of the petitioner in this case is Malaysia. The question before this court is whether from the facts, the petitioner has acquired a domicile of choice in the USA.

[39] Clear evidence is required to establish a change of domicile. In particular, to displace the domicile of origin in favour of the domicile of choice,

the standard of proof goes beyond a mere balance of probabilities. This principle was established by Sir Jocelyn Simon P in the case of *Henderson v Henderson* [1965] 1 All ER 179:

> In order to help resolve such difficulties the law has evolved further rules. First, clear evidence is required to establish a change of domicile. In particular, to displace the domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere balance of probabilities.

[40] The petitioner has stated in his affidavit that he left Malaysia to settle down in the USA and therefore he had acquired a domicile of choice in the USA. Case authorities has held that the oath of a person whose domicile is in question as to his intention to change his domicile is not conclusive. The question for this court is whether upon a review of all the circumstances it gives credit to his evidence. In this regard, the court in the case of *Joseph Wong Phui Lun v Yeoh Loon Goit* [1978] 1 MLJ 236 held that:

> The oath of the person whose domicile is in question as to his intention to change his domicile is not conclusive. The question for the court is whether upon a review of all the circumstances it gives credit to his evidence.

[41] Reverting back to this present case, this court is unable to find any clear evidence in support of the fact that the petitioner has abandoned his Malaysian domicile. It is this court's finding that the petitioner in his affidavit has not confirmed or affirmed that he has given up his Malaysian citizenship, or that he intends to reside permanently in the USA, or that he has secured investment, employment or a residence there. Upon a review of all the circumstances, it is clear that the petitioner has failed to rebut the presumption that he continues to retain his Malaysian domicile or that he has displaced his domicile of origin (Malaysia) in favour of his domicile of choice (USA).

[42] It is not in argument that the Superior Court of Arizona in the State of Arizona in the USA at Phoenix had granted a decree of dissolution of the said marriage based on its jurisdiction on the petitioner having resided in the USA for a mere 90 days before the filing of the petition of divorce and not on the basis that the petitioner is domicile in the USA. Therefore, the 90 days residence to my mind is not sufficient to constitute that the petitioner has acquired a domicile of choice in the USA since the period is too short a stay to show his intention to make the USA his permanent residence, where if he is absent, he has every intention of returning (refer to this court's decision in *James Sloan v Sarala Devi Sloan* [2010] 4 CLJ 483 on the issue of domicile of choice).

[43] With regard to the petitioner husband's argument that based on *Travers v Holley*'s approach, the foreign decree is recognised as valid if it was governed

by the principles of validity which the English courts follow for example under the residential requirement which enabled a wife to obtain a divorce in a country which the husband was not domiciled, this court is unable to accept the petitioner husband's contention that this approach should be followed and therefore the decree obtained by the petitioner should be recognised as valid.

[44] In the case of *Travers v Holley*, the court decided that a decree of divorce given in the Court of New South Wales against a husband who had acquired a domicile of choice in New South Wales should be recognised in the English courts. The basis for the recognition was the New South Wales Matrimonial Causes Act 1899 which gave to a wife who had been domiciled in New South Wales for up to three years, the right to petition for divorce if her husband had without just cause willfully deserted her, a provision which was in substance similar to the English law under s 13 of the Matrimonial Causes Act 1937. In short the principle that was established by this case is that the court would recognise a jurisdiction which they themselves claimed. In another word, a foreign decree of divorce should be recognised if it was granted by a foreign court which assumed jurisdiction on the same ground as the Malaysian court would have assumed jurisdiction. It is this court finding that the Malaysian courts in this case do not assume jurisdiction to grant a decree of divorce on the basis of residence of a mere 90 days. Therefore this court is of the opinion that it cannot be said that the USA court acted on the same principles that the Malaysian court or the English court for that matter would have acted or grant relief (refer to this court's decision in *Siah Teong Woei v Janet Traynor* [2010] 2 MLJ 820; [2010] 3 CLJ 361 on this point).

[45] Further, if I may add, even if the residential requirement is followed, this court will still have to take into account, among other requirements, the length and quality of the residence to determine whether a real and substantial connection is shown between the petitioner and the country exercising jurisdiction and in this case the period of a mere 90 days, without more, is too short a stay to show any real and substantial connection (refer to the decision of the House of Lords in *Indyka v Indyka* [1969] 1 AC 33).

[46] It must be noted, a Malaysian court in applying the common law position would only recognise a foreign decree of divorce (which purports to dissolve a Malaysian marriage) if it was granted by the court of the parties' domicile or if was granted by a foreign court which assumed jurisdiction on the same grounds as the Malaysian court would have assumed jurisdiction.

[47] In our case, the parties were at all material times domiciled in Malaysia. The basis for this court to assume jurisdiction to dissolve a marriage is as contained in ss 48 and 49 of the LRA 1976.

[48] The Malaysian court will assume jurisdiction if the marriage was registered in Malaysia and the parties are domiciled in Malaysia at the time of the commencement of the proceedings (s 48) or where the wife has been resident here in Malaysia for at least two years immediately preceeding the commencement of filing for divorce in the case where the husband has deserted her (s 49)).

[49] In light of ss 48 and 49 of the LRA 1976, the Malaysian court will have jurisdiction to dissolve this Malaysian marriage, where parties are of Malaysian domicile or in any event, where the wife continues to be resident here in Malaysia after the husband has deserted her. Therefore since the parties are both domiciled in Malaysia, this court has the jurisdiction and power to dissolve the marriage.

[50] As regard to the issue of whether there is substantial injustice in the way the petitioner obtained his divorce decree in the USA court, this could would respectfully agree with the views expressed by Mr Balwant Singh Sidhu that if the foreign decree of divorce is recognised, the respondent will not be able to file proceedings in Malaysia to dissolve her marriage. The most drastic consequence would then be that the Malaysian court would not have jurisdiction to order the division of property or assets acquired during the subsistence of the marriage between two Malaysians. This injustice is compounded by the fact that all these properties and assets were acquired in Malaysia, when both parties were in Malaysia. This is because s 76 of the LRA 1976 only gives this court jurisdiction and power to order the division of assets acquired during the marriage, *when granting* of such decree of divorce.

[51] Apart from that, if the foreign decree is recognised and is declared as valid, the Malaysian court would not be able to adjudicate upon any ancillary reliefs filed by the respondent wife in view of s 76 and s 77 of the LRA 1976. This would not be just and equitable since both the respondent wife and the children are Malaysian citizens living in Malaysia and continues to reside in Malaysia.

CONCLUSION

[52] To sum it up, for all the above reasons, this court does not recognise the decree of dissolution of marriage dated 3 November 2008 granted by the Superior Court of Arizona in the State of Arizona at Phoenix in the USA, and consequently decline registration of the same under s 107 of the LRA 1976.

[53] In the result, this court dismisses the petitioner husband's petition with costs.

Petition dismissed with costs.

Reported by Kohila Nesan